United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,771

899

ANDREAS BOULAMANDIS,

Appellant,

v.

HERBERT BROWNELL, JR.,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit
FILED
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Joseph W. Stewart
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QUESTION PRESENTED

In order that appellant acquire eligibility for suspension of his deportation under Sec. 19(c)(2)(b) of the Immigration Act of 1917 is it necessary that he have been physically present in the United States on July 1, 1948 in order to meet the residence requirement prescribed by that Section.

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UNITED STATES COURT OF APPEALS
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant filed a complaint in the District Court for declaratory judgment, judicial review, and injunctive relief (J. A. 1). The District Court passed an order granting appellee's motion for summary judgment and denied appellant's cross-motion for summary judgment. The District Court further ordered that the complaint be dismissed (J. A. 8). From that final order this appeal is taken (J. A. 27). This Court granted a stay of appellant's deportation pending a determination of this appeal. The District Court's jurisdiction was based on Title 28 USCA Sec. 2201 and Title 5 USCA Sec. 1009. This Court's jurisdiction is had under Title 28 USCA Sec. 1291.

STATEMENT OF THE CASE

Appellant is a citizen of Greece who had entered the United States as a seaman in 1930. He shipped out on occasions but always returned. His last entry was on February 19, 1949. (J.A. 1, 4, 9, 11, 18)

He was in possession of a temporary seaman's visa on his last entry which has long since expired. Appellant was taken into custody and found deportable because of his intention to remain here permanently although not in possession of a valid visa. (J.A. 2, 5, 9, 11, 12, 14)

In the course of his deportation hearing held on September 17, 1951, appellant applied for suspension of his deportation under the residential feature of Sec. 19(c)(2)(b) of the Immigration Act of 1917. (J.A. 17)

The Hearing Officer concluded as a matter of law that appellant did not meet the residence requirements of Sec. 19(c)(2)(b) of the Immigration Act of 1917 and hence was ineligible for the relief he sought. (J.A. 11-13, 14-16) Appellant was ordered deported.(J.A. 13, 16)

An appeal to the Board of Immigration Appeals affirmed the Hearing Officer's decision (BIA Dec. 12/1/52). (J.A. 8-10)

Throughout the deportation hearing appellant insisted that he was a bonafide resident for the requisite period which would entitle him to eligibility for suspension of deportation under the Act. In support of his contention he offered evidence for the record as follows:

(a) Appellant entered the United States as a seaman in 1930 and remained continuously thereafter under an expired visa until January, 1947, a total of seventeen years. (J.A. 18, 21)

(b) It is conceded that appellant is a man of good moral character and has no connection with Communist

activities or subversive groups or organizations. (J.A. 15)

(c) In 1944 appellant was arrested under a Warrant of Deportation issued by the Immigration and Naturalization Service. He was charged with being unlawfully in the United States on an expired seaman's visa. In 1944 appellant was granted pre-examination looking toward adjustment of his immigration status. Later he was advised that the pre-examination so authorized was revoked because the Greek quota had been exhausted. (J.A. 15, 23)

Appellant was then ordered deported. He was given the privilege of departing voluntarily with the express understanding that upon his failure to so depart within a prescribed time he would be summarily deported. He departed voluntarily on a foreign-flag vessel on January 18, 1947 under the threat of deportation. (J.A. 16, 21, 23)

(d) Appellant's vessel returned to the United States in July, 1947 when he was ordered to a hospital because of illness. He was discharged from the hospital in August, 1947. He was denied shore leave and returned to his ship because of his expressed intention to return to his apartment in New York City (J. A. 22, 23)

(e) Appellant again shipped out on a vessel in September, 1947 and returned to a United States port in March, 1948. Again appellant was retained on board by the immigration authorities because he intended to return to his apartment in New York (J.A. 22, 23)

(f) Appellant stayed on his ship in Baltimore about three months and shipped out again in May, 1948.(J.A. 24)

(g) On July 1, 1948, appellant's vessel was in South American waters. (J.A. 24)

(h) Appellant returned to the United States at Providence, Rhode Island on February 19, 1949. He was permitted to go ashore on a seaman's temporary visa. Appellant went to his home in New York where he has remained to date. (J.A. 23, 24)

(i) Appellant has been steadily employed in New York from 1930 to 1947 and from 1949 to the date of his hearing. (J.A. 18).

(j) Appellant is married. His wife and two children live in Greece. He has not seen or visited with them since 1930. Appellant has supported them all these years. The children are now 29 and 31 years old. (J.A. 12, 15, 18, 21).

(k) Appellant lived at several addresses in New York City during the period 1930 to date. (J.A. 18, 21, 25, 26).

(l) Appellant paid New York State and Federal income taxes in New York City over the years. (J.A. 19.).

(m) Appellant maintained a bank account at the Bowery Savings Bank jointly with Bessie Annastas, a relative, both before his departure and during his absence. (J.A. 19, 20).

(n) Appellant continued to pay absentee rent on his dwelling quarters during his absence in 1947 to 1949 where he left his clothes, furniture, and other personal effects. (J.A. 11, 21, 22, 25, 26).

(o) Appellant registered with Selective Service in 1941. (J.A. 20).

(p) Appellant registered under the Alien Registration Act in 1940 and thereafter, giving his place of residence as New York City. (J.A. 20, 21).

(q) Appellant's only reason for leaving New York was because "* * * they told me to go * * * the immigration. They told me to go otherwise they would deport me." (J.A. 21).

(r) During the time appellant was outside the United States aboard vessels he considered New York his home and intended to return to it. (J.A. 22, 23, 25, 26, 27).

(s) Appellant did not attempt to establish a residence elsewhere. He was constantly on a vessel during the two years of his absence from the United States. (J. A. 9, 10, 11, 12, 18, 21, 22, 23).

The Hearing Officer at the deportation hearing entered his oral decision on September 7, 1951, concluding as follows: (J. A. 14-16).

(a) Appellant was a person of good moral character.

(b) Appellant might have had "constructive residence" in the United States for the seven years requisite time as prescribed by statute.

(c) Appellant was not physically present in the United States on July 1, 1948 but was at sea.

The Hearing Officer then concluded: (J.A. 16)

> "While there may be some validity to respondent's contention of a constructive residence I fail to see how the circumstances outlined establish a residence for the respondent as required by the Statute, especially since he was not physically present in the United States on July 1, 1948, but was, in fact, in South America, or in the vicinity of South America on board a ship of foreign registry. It seems to me unfortunate that although respondent has a considerable period of residence in the United States that by reason of his well meaning departure in January 1947 that he should lose the benefits of Public Law 863 had he remained in the United States.
>
> "Accordingly, it is my opinion that the respondent has not established his eligibility for suspension. * * * ".

The Assistant Commissioner, Adjudications Division of the Immigration and Naturalization Service on review affirmed the decision of the Hearing Officer by his order of April 23, 1952. His order in pertinent part reads: (J. A. 11-13)

> "Upon consideration of the alien's contention that he maintained seven years continuous residence in the United States so as to be eligible for suspension of deportation it would appear that his departure from the United States in January, 1947, resulted in termination of his residence in this country."
>
> * * *
>
> "The evidence of record establishes that he was not physically present in the United States on July 1, 1948 but was * * * on board a ship of foreign registry."

The Board of Immigration Appeals affirmed the orders below by its decision of December 1, 1952. (J.A. 8-10)

STATUTE INVOLVED

Section 19 (c) (2) (b) of the Immigration Act of 1917, 62 Stat. 1206, 8 USC 155 (c), effective date: July 1, 1948. The pertinent portion of the statute is set out below:

> (c) In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien, if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such an alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.

STATEMENT OF POINTS

1. The District Court erred in concluding as a matter of law that appellant, in order to meet the residence requirement for eligibility for the relief of suspension of deportation under the Section, was required to be physically present in the United States on July 1, 1948.

2. The District Court erred in concluding from the evidence disclosed by the record that appellant had interrupted his residence in the United States for a residence elsewhere.

3. The District Court erred in granting appellee's motion for summary judgment and denying appellant's cross-motion for summary judgment. The facts, not being in dispute, summary judgment should have been entered, as a matter of law, for the appellant below.

SUMMARY OF ARGUMENT

There is no question as to appellant's deportability. Furthermore, it cannot be contested that appellant has met all the statutory requirements for eligibility for suspension of his deportation under Section 19 (c) (2) (b) of the Immigration Act of 1917. The appellee and the Court erroneously assumed that appellant was required to be physically present in the United States on July 1, 1948 in order to meet the residence requirement under the Act.

Residence on July 1, 1948, not physical presence, is the mandate of Section 19 (c) (2) (b) to meet the residence requirement of eligibility for suspension of deportation. Nothing in the Act, legislative history or decisions compels any other interpretation.

The Appellant clearly established his residence in New York by both act and intent beginning in 1930 and continuing to the date of these

proceedings. His enforced departure for a period of two years by the appellee did not in and of itself create a new residence nor terminate appellant's established residence in New York.

ARGUMENT

POINT 1

Physical Presence of Appellant in the United States on July 1, 1948 Was Not Required To Meet The Test Of Residence Under Section 19(c) (2) (b) Of The Immigration Act of 1917

Section 19(c) (2) (b) of the Immigration Act of 1917 requires that an alien, in order to be eligible for suspension of deportation, have:

> "* * * resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act." [1]

Appellant admittedly had seven continuous years of residence in the United States. The record bears out his residence on July 1, 1948, although he was not physically present in the country on that date. By act and intent appellant has demonstrated continuous residence here since 1930.

While he is a Greek citizen by birth, he has never indicated a desire to return there after his arrival in this country in 1930. His intent to remain a resident of this country was clear from his acts. His long residence in New York City, continued employment, regular payment of taxes, his desire to remain here despite threats of deportation coupled with the payment of absentee rent on an apartment maintained to house his personal effects, and the keeping of a bank account during his enforced absence is unshakeable evidence of intent to establish and maintain his residence in New York.

---

1 July 1, 1948

The appellee, on the other hand, has offered no evidence which would tend to indicate a desire by appellant to relinquish his residence in New York for a residence elsewhere. The appellant sustained his burden of proof on the issue of residence under the Act. Appellee had the burden of going forward with the evidence to meet or overcome appellant's proof but failed to do so. Appellee relied solely upon the erroneous legal concept of physical presence on July 1, 1948 in the United States to defeat appellant's position.

Undoubtedly appellee reasons from the language of the Immigration and Naturalization Act of 1952 where the new "suspension" law[2] specifically requires that the alien be physically present in the United States as of a certain date. However, the Congress which enacted the Immigration Act of 1917 and its amendments did not see fit then to impose such a requirement upon aliens who sought to adjust their status.

It is a universally recognized rule that a domicile or residence of choice is presumed to continue until it is shown to have changed. It follows that the burden of proving a change is on him who alleges the change. Mere absence from a fixed home does not effect a change of residence in the absence of factors tending to prove permanent abandonment. 17 Am. Jur. "Domicile", Secs. 22, 23, 81. This record is devoid of evidence indicating or suggesting abandonment of New York by appellant as his residence.

It is further urged that the appellee prevented the appellant from continuing his physical presence in the United States by ordering him deported and refusing to let him ashore on his several return trips to this country. The only reason for refusing appellant shore leave was because he expressed his intention of returning to his apartment in New York.

2 Section 244(a) of the Immigration and Naturalization Act of 1952 relating to similar relief of suspension of deportation is worded in pertinent part as follows:

> " * * * and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of last application, * * * "

A simple reading of Section 19(c) (2) (b) clearly indicates that the law intended to defer or suspend the deportation of aliens illegally in this country who had resided here for more than seven years. The date July 1, 1948 was intended as a "cut-off" date in order to discourage others from seeking relief who might come here illegally after that date in the hope of acquiring a status looking toward citizenship. Physical presence on July 1, 1948 was not a requisite under the 1917 Act to meet the residence requirement for such relief.

Therefore, appellant had residence in this country on July 1, 1948 as well as prior and subsequent thereto. The fact that he was temporarily absent on July 1, 1948 pursuing his calling as a seaman cannot be a basis for his having acquired a residence elsewhere. A good discussion of the purpose of Section 19(c) (2) (b) on similar facts is set out in Theodore de Koning v. Karl I. Zimmerman, (DCED Pa., 1950) 89 F. Supp. 891.

POINT 2

Appellant Did Not Interrupt His Residence in the United States for a Residence Elsewhere

It is well settled as a matter of practice before the Board of Immigration Appeals that where an alien departs under a warrant of deportation, such departure does not operate to terminate domicile in the United States and preclude him from discretionary relief thereunder. In the Matter of S-, in Exclusion Proceedings No. 55915/701, decided December 3, 1943, the decision discussed residence and cited several State Court cases. Two such cases in point held:

> " * * * residence and abandonment are each determined in part by intention, and it cannot be said that enforced absence of a settler by compulsion of the law from his established residence carried with it the intention to abandon that from which he has been unwillingly removed. * * * abandonment is something more than the relinquishing of possession. It must be voluntary relinquishment united with an intention to abandon. (Huffman v. Smyth, 47 Oreg. 575, 84 P 80 (1906).

* * *

> "And such place of residence or usual abode, is not changed or abandoned, by a constrained removal, as by imprisonment. Such is the law in regard to national domicile; and we think its principles applicable to domestic residence. (Grant v. Dalliber, 11 Conn. 234 (1886)".

The appellee has failed to produce evidence to overcome appellant's strong proof of established residence in this country. The only evidence offered by appellee is its own penal act of deporting appellant in 1947 after a hearing on an arrest warrant. Appellant's forceful removal under circumstances where he was unwilling to depart did not operate to terminate his residence here. Therefore, appellant had continuous residence from 1930 including July 1, 1948 so as to qualify for relief of suspension of his deportation under the 1917 Act.

CONCLUSION

Appellant is entitled to a declaratory judgment of eligibility for relief of suspension of deportation under Section 19(c) (2) (b) of the Immigration Act of 1917. The judgment of the District Court granting appellee a summary judgment should be reversed with directions to enter an order granting appellant's cross-motion for a summary judgment. The District Court should be directed to remand the case to the Attorney General for further proceedings on appellant's application for suspension of his deportation.

Respectfully submitted,

JOSEPH J. LYMAN
Attorney for Appellant

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JOINT APPENDIX

[Filed April 25, 1955]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANDREAS BOULAMANDIS 854 2nd Ave. New York, New York Plaintiff v. HERBERT BROWNELL JR. Attorney General of the United States Defendant	)	Civil Action No. 1834-55

COMPLAINT

(Action for Declaratory Judgment and Review under the Administrative Procedure Act and for Injunctive Relief)

The plaintiff respectfully alleges:

1 That this is an action for declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review under the Administrative Procedure Act (5 U.S.C. 1001 et seq).

2. The defendant, Herbert Brownell, Jr., is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be deported from the United States.

3. Plaintiff is an alien, citizen of Greece, and not claiming American citizenship.

4. The plaintiff entered the United States lawfully as a seaman in 1930 and remained in the United States continuously to January, 1947 when he departed as a seaman voluntarily for the purpose of continuing

in his occupation. The plaintiff intended and did return to the United States to resume his residence but was detained from effecting his return until February 19, 1949. Upon his resuming residence, plaintiff has continuously resided in the United States up until the date of the filing of this complaint.

5. Defendant issued a warrant of arrest on May 24, 1949, and served it April 21, 1950, upon the plaintiff. Plaintiff was charged with having remained in the United States longer than permitted by his seaman's visa.

6. A hearing was held in September, 1951 on the charge set out in the warrant, to wit, that under the Immigration Act of May 26, 1924, the plaintiff was subject to deportation, in that, at the time of entry he was an immigrant not in possession of a valid immigration visa. At the hearing the plaintiff made application for suspension of deportation under Section 19(c)(2)(b) of the Immigration Act of 1917, as amended, and as a secondary relief in the alternative asked for voluntary departure in lieu of deportation.

7. In support of his application for suspension of deportation, the plaintiff demonstrated that he had no criminal record, was a person of good moral character, and had no affiliation with disloyal or subversive groups. In the course of the hearing there were no findings to the contrary and the defendant concluded that plaintiff was a person of good moral character.

8. The defendant's Hearing Officer concluded that since plaintiff was not physically present in the United States on July 1, 1948, he was not eligible for suspension of deportation under the provisions of Section 19(c)(2)(b) of the Immigration Act of 1917, and was ordered on April 23, 1952, to voluntarily depart from the United States pursuant to his alternative request for relief.

9. Plaintiff says that the sole reason for the denial of his application for relief of suspension of deportation was based upon the defendant's erroneous conclusion of law that he was not residing in the United States on July 1, 1948.

10. The plaintiff exercised his right of appeal from the erroneous decision of the defendant's Hearing Officer to the Board of Immigration Appeals. The Board, on December 1, 1952, entered an order affirming the decision of defendant's Hearing Officer and specifically holding that:

> "Since this respondent (plaintiff) has failed to meet the residence requirements for suspension of deportation, the appeal must necessarily be dismissed."

The plaintiff further says that the Board of Immigration Appeals compounded the original error of law which was the basis of the Hearing Officer's order of deportability.

11. The plaintiff, having exhausted his administrative remedies and finalized his order of deportability as of December 1, 1952, petitions this court to stay his deportation which has now been set for April 28, 1955 at 9:00 A.M. until his complaint can be heard on the merits.

12. The defendant has failed to exercise the discretion vested in him by law to act upon the applications of deportable aliens to suspend their deportation for the reason that his decision requiring the plaintiff to depart was based solely on an error of law which, had it been correctly decided, would have resulted in permitting the plaintiff to remain.

13. The defendant's action in causing the deportation of the plaintiff, based upon an erroneous conclusion of law, is an arbitrary and capricious exercise of the power vested in the Attorney General to act in deportation matters. Unless restrained by order of this Court, the defendant will cause the plaintiff's deportation by its summary procedures and deprive the plaintiff of a remedy and this court of jurisdiction to review the arbitrary action of the defendant which has resulted in plaintiff's denial of due process of law.

14. Unless the defendant is restrained forthwith from taking the plaintiff into custody and deporting him, the plaintiff will be irreparably injured and deprived of access to this or any other court to seek relief to which he is entitled.

WHEREFORE, plaintiff prays the Court to:

(1) Enjoin the defendant from taking him into custody and deporting him until this case is heard on the merits.

(2) Declare the proceedings of the Immigration and Naturalization Service and Board of Immigration Appeals null and void.

(3) Remand the case to the defendant for further hearing and correction of the erroneous conclusions of law upon which his decision is premised.

(4) And for such other and further relief as may seem just.

/s/ Joseph J. Lyman

* * * *

Attorney for Plaintiff

[Filed July 12, 1955]

ANSWER

Now comes the defendant by his attorney, the United States Attorney, and answers the complaint of plaintiff as follows:

First Defense

Responding specifically to the numbered paragraphs of the complaint the defendant avers:

1. The defendant is not required to answer the allegations contained in paragraph 1 of the complaint.

2. and 3. Admitted.

4. It is admitted that the plaintiff entered the United States as a seaman in 1930 and that he remained here until January, 1947. It is further admitted that in January, 1947 the plaintiff departed from the United States as a seaman and in that connection, it is alleged that the said departure was pursuant to administrative proceedings which required his departure from the United States in lieu of deportation. It is further admitted that the plaintiff re-entered the United States in February, 1949,

and that he has resided in the United States since February 1949. It is denied that the plaintiff's original entry in 1930 was a lawful one. It is averred that the plaintiff did not have any residence within the United States between January, 1947 and February, 1949.

5. It is admitted that a warrant of arrest in deportation proceedings was issued on May 24, 1949. It is alleged that the charge contained in the said warrant of arrest was that the plaintiff was in the United States in violation of law, to wit: "The Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from presentation thereof by said Act or regulations made thereunder."

6. and 7. Admitted.

8. It is admitted that the hearing officer concluded that the plaintiff was not eligible for suspension of deportation under the provisions of Section 19(c)(2)(b) of the Immigration Act of 1917 and that he prefaced that conclusion in part upon the fact that the plaintiff was not physically present in the United States on July 1, 1948. It is averred that the hearing officer's conclusion was also prefaced upon the fact that the plaintiff was not resident in the United States between January 1947 and February 1949. It is admitted that the plaintiff was ordered by the order of the Assistant Commissioner, Adjudication Division, Immigration and Naturalization Service, dated April 23, 1952, to depart voluntarily from the United States in lieu of deportation.

9. The allegations of paragraph 9 constitute conclusions of law and require no answer. It is further averred that the defendant's conclusion as to the plaintiff's ineligibility for suspension of deportation was not erroneous.

10. It is admitted that the Board of Immigration Appeals in its order of December 1, 1952, affirmed the decision theretofore entered in the plaintiff's case and that the said Board of Immigration Appeals used the language as set forth in allegation 10 of the complaint. It is further averred, however, that the decision of the Board of Immigration

Appeals was, as a matter of law, proper and correct and that there was no error of law.

11. It is admitted that the plaintiff has exhausted his administrative remedies. The remaining statements of paragraph 11 constitute prayers for relief by the Court and they require no answer.

12. It is denied that the defendant has failed to exercise the discretion vested in him by law to decide applications for suspension of deportation and it is further specifically averred that the decision of the defendant is not based upon any error of law.

13. It is denied that the decision of the defendant is in any way arbitrary or capricious. The remaining allegations of paragraph 13 are denied.

14. Denied.

Second Defense

For further answer and as a separate and complete defense to the complaint the defendant avers that the complaint fails to set forth a cause of action upon which this Court may grant relief.

Third Defense

For further answer and as a separate and complete defense to the complaint the defendant avers that the administrative deportation proceedings have been properly conducted pursuant to law and regulation; that there has been no arbitrary or capricious determination made anywhere within the said administrative proceeding; that the final result is premised upon a careful consideration of the entire administrative record and the application of the appropriate statutory law; that there has been a judicious exercise of discretion by the administrative authorities based upon the entire record; that such discretion having been reasonably and properly exercised and such determinations having been reasonably and properly made, should not be disturbed by this Court.

WHEREFORE, having fully answered plaintiff's complaint, the defendant demands judgment together with the costs of this suit.

/s/ Leo A. Rover

United States Attorney

[CERTIFICATE OF SERVICE]

[Filed February 1, 1957]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant by his attorney the United States Attorney and moves this Honorable Court for an order granting summary judgment in the above-captioned case for the following reasons:

Based upon the pleadings herein and the certified Immigration and Naturalization Service file No. A-1027554 pertaining to Andreas George Boulamandis or Andrew or Andre G. Mantis, 56353/760, there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law. Said file is attached hereto as Exhibit I and incorporated into and made a part of this motion.

/s/ Oliver Gasch
United States Attorney

[CERTIFICATE OF SERVICE]

[Filed March 5, 1957]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S COUNTERMOTION FOR SUMMARY JUDGMENT

Plaintiff opposes the defendant's motion for summary judgment and moves the Court to grant plaintiff a summary judgment as a matter of law on the ground that no material issue of fact exists in the pleadings and certified record of the Immigration and Naturalization Service file No. A-1027554 on file as an exhibit herein.

/s/ JOSEPH J. LYMAN
Attorney for Plaintiff

[CERTIFICATE OF SERVICE]

[Filed March 25, 1957]

ORDER

The above-entitled cause having come on for hearing on defendant's motion for summary judgment and plaintiff's cross motion for summary judgment, and counsel having been heard, and it appearing on the basis of the arguments and the Immigration and Naturalization Service file pertaining to the plaintiff, that there is no genuine issue as to any material fact, it is 25th day of March 1957

ORDERED that defendant's motion be and hereby is granted and plaintiff's motion is denied, and it is

FURTHER ORDERED that the complaint herein be and hereby is dismissed.

/s/ MATTHEW F. McGUIRE, Judge

U.S. DEPARTMENT OF JUSTICE
Board of Immigration Appeals

[Dec. 1, 1952]

File: A-1027554 - New York (0500/23617)

In Re: ANDREAS BOULAMANDIS or ANDREAS GEORGE BOULAMANDIS or ANDREW or ANDRE G. MANDIS

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Leo Ypsilanti, Esquire
51 Chambers Street
New York 7, New York
(Heard: June 18, 1952)

CHARGES:

Warrant: Act of 1924 - No immigration visa

Lodged: None

APPLICATION: Suspension of deportation - Seven years' residence

DETENTION STATUS: Released on own recognizance

This is an appeal from a decision of the Assistant Commissioner on April 23, 1952 finding the respondent deportable on the charge in the warrant of arrest, disallowing suspension of deportation, and granting voluntary departure with the additional order that should the alien fail to depart, that he be deported pursuant to law.

Counsel has presented certain facts in his argument tending to show that this respondent who arrived in the United States as a crewman in 1930 and remained here up to January 1947 when he departed as a seaman, voluntarily, and continued to work in that occupation up to the occasion of his last entry on February 19, 1949, has met the residence requirements of Section 19(c)(2)(b) of the Immigration Act of 1917, as amended. Counsel insist that although the respondent was not physically present in the United States on July 1, 1948 that such does not preclude the granting of the relief for which he has applied.

The sole issue in this case is whether this respondent has met the residence requirement for suspension of deportation under the provisions of Section 19(c)(2)(b) of the Immigration Act of 1917, as amended.

This record establishes that this respondent did come to the United States as a crewman in 1930. He has never been admitted to this country for permanent residence. His family is in Greece and he is a native and citizen of that country. The record indicates that he remained in this country from 1930 up to January 18, 1947 at which time he was permitted to depart voluntarily and he sailed foreign as a seaman. Upon his return to this country, he was detained on board as a mala fide seaman (immigrant without an immigration visa). On one occasion when he arrived in this country, he was ill and was taken to a hospital for

treatment where he remained from July to August 1947. After his release from the hospital, he was removed and rejected and sailed foreign as a seaman without having been admitted to this country. In other words, he did not enter the United States between January 1947 and February 19, 1949, the occasion of his last entry, although he applied for admission in 1947 and 1948 respectively. His absence from January 1947 to February 1949 was a period of approximately two years during which he was rejected as a mala fide seaman and not permitted to enter this country.

The foregoing facts establish that this respondent has not met the residence requirements for suspension of deportation under the provisions of Section 19(c)(2)(b) of the Immigration Act of February 5, 1917, as amended. This is true for the reason that between January 1947 and February 1949, a period of two years, this respondent was a rejected or excluded alien and was not a resident of the United States within the meaning of Section 19(c)(2)(b) of the Immigration Act of February 5, 1917, as amended. It has been held that Section 19 of the Act of 1917, as amended, is concerned only with resident aliens. 1/

Since this respondent has failed to meet the residence requirements for suspension of deportation, the appeal must necessarily be dismissed.

ORDER: It is ordered that the appeal from the decision of the Assistant Commissioner on April 23, 1952 be and the same is hereby dismissed.

Chairman

1/ Volume 3, I&N Dec. p. 501 (BIA 1949); Kaplan v. Tod, 267 U.S. 229.

File: A-1037554 - New York [Apr. 23 1952] (Appeal 15)

In re: ANDREAS BOULAMANDIS or ANDREAS GEORGE BOULAMANDIS or ANDREW or ANDRE G. MANDIS

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: Leo Ypsilanti, Esquire
51 Chambers Street
New York 7, New York
(Heard March 13, 1952)

CHARGES:

Warrant: Act of 1924 - No immigration visa Lodged: None

APPLICATION: Suspension of deportation or voluntary departure

DETENTION STATUS: Released on own recognizance

Upon consideration of the entire record, including the exceptions taken and arguments of counsel, the decision of the officer conducting the hearing is hereby adopted.

At a hearing held in the Central Office on March 13, 1952, counsel requested that the alien be granted suspension of deportation based upon a continuous residence in the United States in excess of seven years and that he was residing in the United States on July 1, 1948. Counsel further states that he was not asking for any alternate relief as this man has been in the United States for twenty-two years, was a victim of circumstances and that to send this alien out of the United States would cause an extreme hardship. Counsel contends that the question involved is whether the alien met the residence requirements for suspension of deportation. Counsel admits that the alien was not in the United States on July 1, 1948 but was still on a ship somewhere in South America. It is the contention of counsel that the alien resided in the United States from 1930 and has maintained a residence although absent at sea. It is alleged that he maintained a residence by keeping furniture, paying rent, retaining a bank account and had never took up residence in any other place.

The alien is a native and citizen of Greece, who last entered the United States at Providence, Rhode Island on February 19, 1949, as

a member of the crew of the SS "Mt. Myrto". He has a wife and two children residing in Greece. He contends that he first entered the United States during 1930 and remained in the United States continuously to date, with the exception of temporary absences between 1947 and 1949 occasioned by his having returned to his calling as a seaman.

According to the record application was made for a warrant of arrest on a "no visa charge" in 1944. The warrant of arrest did not issue, but preexamination was granted on November 6, 1944. On June 3, 1946, preexamination was revoked because of exhaustion of the Greek quota and the alien given voluntary departure. He departed as a seaman on January 18, 1947 on the SS "Myrto". It appears that he sailed in and out of the United States, and on each occasion was detained on board as a mala fide seaman. In July, 1947, he was ordered into the United States Public Health facility as a medical hold and upon his discharge from the hospital in August, 1947 he was held to be a mala fide seaman. He was deported pursuant to the detention order which was served upon the agent of the veseel upon his discharge from the hospital. The record discloses that between January, 1947, when the respondent first departed from the United States voluntarily, and February, 1949, when he last entered the United States, he was not physically present in the United States in that he was not permitted to go ashore.

Upon consideration of the alien's contention that he maintained seven years continuous residence in the United States so as to be eligible for suspension of deportation it would appear that his departure from the United States in January, 1947, resulted in termination of his residence in this country.

It has been held that domicile or residence may be interrupted by deportation, (notwithstanding any contrary desire or intention on the part of the alien).

Although the alien may have had a desire or intention of maintaining residence in the United States at the time he was permitted to voluntarily depart in 1947, it appears that such departure did in fact

break the continuity of his residence so as to make him ineligible for suspension of deportation based on a claim of seven years continuous residence. He was not thereafter permitted to legally enter the United States in connection with his calling as a seaman. Furthermore, he has admitted and the evidence of record establishes that he was not physically present in the United States on July 1, 1948 but was, in fact, in South America or in the vicinity of South America on board a ship of foreign registry. In view of the foregoing, it is concluded that respondent has not met the requirements of Section 19(c) of the Act of 1917 (Public Law 863, 80th Congress) and is therefore not eligible for relief by suspension of deportation. However, he should be afforded an opportunity to depart voluntarily if he so desires.

ORDER: It is ordered that application for suspension of deportation be denied.

IT IS FURTHER ORDERED that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government, within such period of time and under such conditions as the Officer in Charge of the District deems appropriate.

IT IS FURTHER ORDERED that in the event the alien fails to depart within the period of time and under the conditions as fixed by the Officer in Charge of the District, he be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

/s/ A. C. Dwoney

ASSISTANT COMMISSIONER
ADJUDICATIONS DIVISION

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
New York 23, N. Y.

File: A1 027 554

IN DEPORTATION PROCEEDINGS

In re: ANDREAS BOULAMANDIS or ANDREAS GEORGE BOULAMANDIS or ANDREW or ANDRE G. MANTIS

* * * * * *

CHARGES:

Warrant: Act of 1924 - no immigration visa

Lodged: None

APPLICATION: Suspension of Deportation, or Voluntary Departure

DETENTION STATUS: Released on own Recognizance

HEARING OFFICER'S ORAL DECISION

The respondent is a 48-year-old male, a native and citizen of Greece. By his testimony and other evidence of record it is established that he last entered the United States at Providence, R.I. on February 19, 1949 as a member of the crew of the S.S. Mt. Myrto. That entry has been verified. Inasmuch as it was respondent's intention at the time of his last entry to remain in the United States permanently he must be considered an immigrant and as such was required to present an immigration visa, which document he did not have. Accordingly, respondent's entry into the United States was unlawful as charged in the warrant of arrest.

FINDINGS OF FACT: - AS TO DEPORTATION

(1) That the respondent is an alien, native and citizen of Greece;

(2) That the respondent last entered the United States at Providence, R.I. on February 19, 1949 as a seaman;

(3) That it was respondent's intention to remain permanently at the time of his last entry;

(4) That respondent was not in possession of an immigration visa.

* * * * * *

The respondent has applied for suspension of deportation under the residential feature of the statute and in the alternative asks for voluntary departure in lieu of deportation.

The respondent is married. His wife and two children, all reside in his native country. The respondent has assets of approximately $2600.00, $1500.00 of which is in cash; the balance in furniture, jewelry and personal effects. He is employed as a porter, earning $59.25 a week.

The respondent disclaims any criminal record and denies affiliation with any of the subversive groups. There has been no evidence to the contrary. The finding of good moral character is justified.

With respect to respondent's application for suspension of deportation it is his contention that he first entered the United States during 1930 and remained in the United States continuously to date, with the exception of temporary absences between 1947 and 1949 occasioned by his having returned to his calling as a seaman. The record shows that during approximately 1944 respondent was granted the privilege of preexamination with voluntary departure. The privilege of preexamination was revoked because of the unavailability of the Greek quota to which the respondent was to be charged, and respondent was accorded an opportunity to depart from the United States voluntarily. This he did by shipping out as a seaman during January of 1947. Upon his return to the United States in July of 1947 he was ordered into the United States Public Health facility as a medical hold and upon his discharge from the hospital in August 1947 he was held to be a mala fide seaman. Subsequently the respondent was deported pursuant to a detention order which was served upon the agent of the vessel upon his discharge from the hospital in August 1947. The respondent next returned to the United States in March of 1948 at Baltimore, Maryland when he was again detained on board as a mala fide seaman and departed. He departed with that vessel during approximately May of 1948. It is significant to note that between January 1947 when respondent first

departed from the United States voluntarily and February 1949 when he last entered the United States respondent was not physically present in the United States in the sense of not being permitted to go ashore. It has been held both administratively and judicially that a person who is stopped or detained and not admitted to the United States is in the same position as a person who is stopped at the boundary line of the United States. While there may be some validity to respondent's contention of a constructive residence I fail to see how the circumstances outlined establish a residence for the respondent as required by the statute, especially since he was not physically present in the United States on July 1, 1948 but was, in fact, in South America, or in the vicinity of South America on board a ship of foreign registry. It seems to me unfortunate that although respondent had a considerable period of residence in the United States that by reason of his well meaning departure in January 1947 that he should lose the benefits of Public Law 863 had he remained in the United States.

Accordingly it is my opinion that the respondent has not established his eligibility for suspension. However, I believe that the respondent should be accorded the further opportunity to depart from the United States voluntarily.

My ORDER is:

> That the respondent be granted voluntary departure in lieu of deportation within such time and under such conditons as the Officer in Charge may direct.

IT IS FURTHER ORDERED:

> That should the respondent fail to depart from the United States within the time specified or any authorized extension thereof, that he be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

* * * * * *

In the Matter of DEPORTATION PROCEEDINGS -Against- ANDREAS BOULAMANDIS or ANDREAS GEORGE BOULAMANDIS or ANDREW or ANDRE G. MANTIS RESPONDENT	)))))))))	New York File No. A1 027 554 C.O. No.: A1 027 554 Hearing Officer: Louis Kaye Stenographer: Calvin C. Curtiss Language: English Hearing Conducted at: Ellis Island, N.Y.H. Date: September 17, 1951

* * * * * *

HEARING OFFICER TO RESPONDENT

Q. What is your name? A. Andreas Boulamandis.

* * * * * *

HEARING OFFICER TO RESPONDENT

Q. I show you a Certificate of Arrival of Alien Seaman which shows that Andreas Boulamandis entered the United States as a seaman on the S.S. Mt. Myrto at Providence, Rhode Island on February 19, 1949. Does this record relate to you?

BY COUNSEL

We concede identity.

* * * * * *

HEARING OFFICER TO COUNSEL

Counsel, I will entertain an application for discretionary relief at this time.

BY COUNSEL

On behalf of the respondent respondent makes application for the relief of suspension of deportation under Section 19(c)(2)(b) of the Act of February 5, 1917, as amended by reason of seven years or more residence in the United States. Secondary relief requested is for voluntary departure at the alien's own expense in lieu of deportation.

* * * * * *

COUNSEL TO RESPONDENT

Q. How long have you resided in the United States? A. From 1930.

Q. And except for the few trips which you stated you made in Form I-55, Government Exhibit No. 6, have you always been in the United States? A. Yes.

Q. Physically been in the United States? A. Yes.

Q. Since you first arrived in the United States on May 19, 1930 and up to the present time have you been steadily employed? A. Yes.

Q. Are you married? A. Yes.

Q. Have you got any children? A. Yes.

Q. Are you supporting your wife and family? A. Yes.

Q. Are you presently employed by the Park-Lexington Co., Inc.?

A. Yes.

Q. What are your present duties and salary per week? A. Porter-$59.25 per week.

* * * * * * * * * * *

Q. Are you presently residing at 854 2nd Avenue, New York City? A. Yes.

Q. And how long have you lived at that address? A. Two years.

Q. And where did you reside prior to 854 2nd Avenue? A. 862 1st Avenue, New York City.

Q. And how long have you resided at that address? A. Five years.

Q. And where did you reside before 862 1st Avenue? A. 212 East 44th Street, New York City.

Q. And how many years did you reside there? A. About a year or so.

Q. And where did you live before 212 East 44th Street? A. 205 East 43rd Street.

Q. And how many years did you live there? A. Two years.

Q. Do you know of your own knowledge whether the building

no returns for '47 & '48

862 1st Avenue is still in existence? A. I don't know.

Q. What happened to that building? A. The United Nations is there. I think it was demolished.

Q. Have you with you any income tax receipts during the period of time that you lived at 862 1st Avenue? A. Yes.

BY COUNSEL

At this time respondent submits statements of withholding tax issued to him for the year 1943 by the Metropolitan Life Insurance Company and also receipts for the years 1944 and 1945.

BY HEARING OFFICER

Let the record show that there is presented United States Treasury Department, Internal Revenue Service Form V2 entitled Statement of Victory Tax withheld by Employer for the calendar year 1943 showing employer as A. Mantis, 862 1st Avenue, New York City; calendar year shown as December 1942 to June 1943, amount of tax withheld - $22.45.

Also presents W2 for the calendar year 1943 showing total taxes paid during the calendar year 1944 as $129.71, and tax withheld $13.40; previous employer is listed as Metropolitan Life Insurance Co.

Also presents W2 for the year 1944 showing employer as Park-Lexington; total wages paid $756.76, amount of tax withheld $56.30.

There is also presented withholding receipts for the years 1944 and 1945, and Form 105 of New York State Income Tax for years 1944 and 1945. (Same returned)

COUNSEL TO RESPONDENT

Q. Do you have a bank account? A. Yes.

Q. In what bank do you maintain such an account? A. The Bowery Savings Bank, City of New York.

Q. When did you open that account? A. 1945.

BY COUNSEL

At this time I'd like to offer in evidence photostatic copies of Account No. 587,468 in the name of Bessie Annastas or Andre Mantis in the Bowery Savings Bank.

* * * * * *

COUNSEL TO RESPONDENT

Q. How long have you resided in the United States? A. From 1930.

Q. And except for the few trips which you stated you made in Form I-55, Government Exhibit No. 6, have you always been in the United States? A. Yes.

Q. Physically been in the United States? A. Yes.

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Q. Have you got any children? A. Yes.

Q. Are you supporting your wife and family? A. Yes.

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* * * * * *

BY HEARING OFFICER

Do you have the original bank book?

BY COUNSEL

Not with me.

HEARING OFFICER TO RESPONDENT

Q. Who is Bessie Annastas? A. A close relative.

Q. The account as cited by the photostatic copies presented was originally opened by Bessie Annastas. Is that right? A. Yes.

Q. And your name was added in March 1945. Is that right? A. That is right.

Q. As a joint account; is that right? A. Yes.

* * * * * *

COUNSEL TO RESPONDENT

Q. Did you register with the Selective Service Headquarters in 1941? A. Yes.

Q. Have you with you any card or evidence from the Selective Service Headquarters as to your classification? A. I got them.

BY COUNSEL

I offer Selective Service Card.

HEARING OFFICER

Let the record show there is presented Selective Service Form 2 in the name of Andreas George Mantis indicating he was registered under The Selective Service and Training Act on February 15, 1941 by Local Board 15, New York City. Additionally there is presented Notice of Classification showing respondent's order No. was 10467 and that he was classified 4H and 4A respectively on June 11, 1941, and November 2, 1944. (Returned)

COUNSEL TO RESPONDENT

Q. Were you registered under the Alien Registration Act of 1940? A. Yes.

Q. Is your registration number 1027554? A. Yes.

Q. Did you also appear at the Post Office under the recent Act the first ten days of January, 1951? A. Yes.

Q. And register as an alien? A. Yes.

Q. Now, it appears on your form I-55 that from May 1930 until January 1947 you were continuously in the country. A. Yes.

Q. Did you thereafter leave the United States on a ship as a seaman? A. Yes.

* * * * * *

Q. And did you follow the calling of a seaman for about two years? A. Yes.

Q. And during those two years were you employed by the North American Shipping and Trading Co., Inc.? A. Yes.

Q. At the time that you sailed out as a seaman in January 1947 where were you living at that time? A. 862 1st Avenue, New York City.

Q. Did you have any furniture of your own at that time? A. Yes.

Q. What did you do with your furniture when you sailed out? A. I kept it.

Q. Did you pay rent for the period that you had been away? A. Yes.

Q. Did you own the furniture? A. Yes, that was my furniture.

Q. And did you have any other personal belongings which you kept at said address? A. Oh sure; my clothes, suits, underwear etc.

Q. And when you left had you withdrawn your money from the Bowery Savings Bank? A. No.

Q. When you left did you have any intentions of residing in any other place other than the United States? A. No.

Q. Did you live in any other foreign country at any time? A. No.

Q. When you left in June 1947 under what circumstances did you so leave? A. Well, they told me to go.

Q. Who told you to go? A. The Immigration. They told me to go otherwise they would deport me.

Q. And did you thereafter return to the United States, - come back to the United States? A. Yes, that's why I kept the apartment.

BY HEARING OFFICER

Do you have the original bank book?

BY COUNSEL

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Q. Who told you to go? A. The Immigration. They told me to go otherwise they would deport me.

Q. And did you thereafter return to the United States, - come back to the United States? A. Yes, that's why I kept the apartment.

Q. And when you returned to the United States where did you go to live? A. 854 2nd Avenue, New York, N. Y.

Q. Did you have any intentions of giving up your residence at 854 2nd Avenue after you went out as a seaman? A. No.

Q. Did you, subsequently in about July 1947, arrive at Baltimore, Maryland with your ship? A. Yes.

Q. Were you permitted to come ashore on that date? A. No, they stopped me.

Q. Do you know why the Immigration Service didn't permit you to come ashore? A. Because I wanted to stay and go to my home.

Q. Had you told the Inspector at Baltimore when you were questioned as to what your intentions were? A. I told him I wanted to go back to New York to my home.

Q. And was there any other time that you arrived at any port in the United States? A. Philadelphia.

Q. What month of the year was that? A. Exactly I don't remember.

Q. About the following year? A. The same year.

Q. And what happened at the port of Philadelphia? A. The same story. They held me back again.

Q. Do you know why? A. I told them I wanted to go to New York.

Q. And did you later on arrive at any other times after that last trip you mentioned in Philadelphia and were you permitted to go ashore? A. Yes, but I was not permitted to go ashore.

Q. And when was that? A. In 1948, at Norfolk.

Q. And where did you go from Norfolk? A. Back to Europe and back again to the United States.

Q. While you were in the United States where did you live after you were admitted at Norfolk?

HEARING OFFICER TO RESPONDENT

Q. Were you allowed to go ashore at Norfolk in 1948? A. Yes.

COUNSEL TO RESPONDENT

Q. When you went ashore where did you go to live? A. I decided to come here, 854 2nd Avenue, New York City.

Q. And then you sailed out again on a ship and then you came back again at Baltimore in February 1949? A. Yes.

Q. And when was the last time you arrived in the United States? A. The last time was in 1949.

Q. That was the date just mentioned? A. Yes.

Q. Were you admitted in the United States at that time? A. Yes.

Q. And since February 1949 did you make any trips out? A. No.

Q. If the United States Immigration Service had not advised you that you were subject to deportation in 1947, January, would you have left the United States? A. No.

* * * * * * *

Q. Now, do you remember in 1946 being advised that preexamination which was previously authorized was revoked? A. Yes.

Q. And at that time you were told that you were given the permission to leave the United States voluntarily. Is that right? A. Yes.

Q. Do you remember why preexamination was revoked? A. No.

Q. Do you remember whether it was because the Greek quota was oversubscribed? A. I don't remember.

Q. Do you know about that at all? A. No.

Q. That was the reason. Do you remember that? A. No.

Q. And did you first leave the United States on January 18, 1947 on the S.S. Myrto? A. Yes.

Q. Now, did the ship first come back to the United States during July 1947 when you were ordered to the hospital? A. Yes.

Q. And do you remember being discharged from the hospital in August 1947? A. Yes.

Q. But you were refused shore leave. Is that right? A. Yes.

Q. When were you first discharged from the hospital what happened? A. They sent me here.

Q. And you were finally put back on the Myrto in September 1947 from detention? A. Yes.

Q. And you left then with that ship again? A. Yes.

Q. Then the Myrto came to Baltimore in March 1948. Is that right? A. Yes.

Q. And you were again detained on board the ship and ordered deported. Is that right? A. Yes.

Q. And you were detained because they considered you a mala fide seaman. Do you understand what that means? A. Yes.

Q. How long did the ship stay in Baltimore after arriving in March 1948? A. About three months.

Q. To about June of 1948? A. Yes.

Q. And then where did the ship go? A. South America.

Q. Now, according to the certificate of arrival which is now Exhibit #3 you were signed on the Myrto on May 1, 1948. How long did you sign articles in Baltimore? Why did the ship stay in port? A. It was making repairs.

Q. How long after you signed articles did the ship stay in port? A. I don't know; it was sometime before the end of May.

Q. So that you probably departed from the United States on the Myrto during May of 1948. Is that right? A. NO ANSWER.

Q. My question was, "So that you probably departed from the United States on the Myrto during May of 1948. Is that right?" A. Yes, from Baltimore.

Q. And the next time you came back was in February 1949. Is that right? A. At Rhode Island, yes.

Q. Actually from the time you first left the United States in January 1947 to the time you sailed from Baltimore during May of 1948 you were not permitted to go ashore anywhere in the United States. Is that correct? A. Yes.

Q. Where were you on July 1, 1948? A. I was on the Myrto in South America.

* * * * * *

Q. When you left on the ship, the Myrto, in January 1947 you were then living at the 1st Avenue address, 862? A. Yes.

Q. And when you left did you give up your apartment; did you move out? A. No.

Q. When did you next return to that apartment the next time? A. When I came back to 854.

Q. Did you ever go back to 862? A. No, I took all my furnishings and took them to 854.

Q. When? A. At the time I left in 1947.

Q. Well, that's almost four years ago. A. I sent a letter.

Q. And you said before that you had your apartment there and when you left in January 1947 you left everything there at First Avenue? A. Everything.

Q. You used to pay rent? A. Yes.

Q. How could you if you went to sea? A. I sent a letter to Jimmie, the place where I'm living now. He come and took the things there.

Q. When did you send this letter to him? A. When I came to Baltimore.

Q. How are you related to Bessie Annastas? A. It's my neice.

Q. Who is James Annastas? A. He's my nephew.

* * * * * *

BY COUNSEL

The comment is that at the time he had shipped out he had lived at 862 1st Avenue. As he testified he sent a letter to James Annastas, a relative to move out the furniture because of the pending demolition of the building and his furniture was removed to his present address 854 2nd Ave. New York City while he was detained on board.

* * * * * *

HEARING OFFICER TO RESPONDENT

Q. Now, is it your contention that you have lived with the Annastas family continuously both at 862 1st Avenue and 854 2nd Avenue? A. No; all alone at 1st Avenue, my apartment.

Q. How long have you lived at the 2nd Avenue address? A. Two years now.

Q. Are you now or have you ever been a member of the Communist Party? A. No.

Q. Do you believe in Communism? A. I don't believe nothing about it.

Q. Do you believe in Nazism or Fascism? A. Nothing.

Q. Do you belong to any organizations? A. Yes, American Federation of Labor.

Q. Any others? A. No.

* * * * * *

COUNSEL TO RESPONDENT

Q. When you returned to the United States on board the S.S. Myrto in 1949, or rather 1947, did you find out that the building in which you were living, 862 1st Avenue, New York City was going to be demolished for the United Nations Building? A. Yes.

Q. And at that time did you get in touch with Jimmie Annastas.

A. Yes.

Q. Did Jimmie live at 854 2nd Avenue? A. Yes.

Q. And you requested him to move your furniture and belongings to that address? A. Yes.

Q. Did he actually remove them to 854 2nd Avenue? A. Yes.

Q. And did you continue to pay rent at that apartment? A. Yes.

Q. Were those payments made from the time you had first sailed out until the present time? A. Yes.

Q. During all the time that you were going in and out of the United States into ports foreign as a seaman what place did you consider your home? A. The United States.

Q. What city? A. New York City.

Q. And what place in New York City? A. 854 2nd Avenue.

* * * * * *

HEARING OFFICER TO RESPONDENT

Q. If you were to be allowed to leave this country voluntarily where would you go? A. Take the ship; that's all.

Q. If you should be ordered deported where do you wish to go? A. Better South America, Argentina.

* * * * * *

[Filed March 26, 1957]

NOTICE OF APPEAL

Notice is hereby given this 26th day of March, 1957, that ANDREAS BOULAMANDIS hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 25th day of March, 1957, in favor of Herbert Brownell, Jr., Attorney General of the United States, against said Andreas Boulamandis.

/s/ Joseph J. Lyman
Attorney for Plaintiff

United States Court of Appeals
For the
District of Columbia Circuit

FILED MAY 16 1957

Joseph W. Stewart
CLERK

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,771

ANDREAS BOULAMANDIS, Appellant,

572

v.

HERBERT BROWNELL, JR.,
Attorney General of the
United States, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
JOSEPH M. F. RYAN, JR.,
FORBES W. BLAIR,
Assistant United States Attorneys.

No. 13,771

QUESTION PRESENTED

Appellant sought to have his deportation suspended pursuant to Section 19 (c) (2) (b) of the Immigration Act of 1917, as amended in 1948. To be eligible for relief the Act stated that an alien must have resided in the United States on July 1, 1948, the effective date of the amendment.

It is undisputed that appellant voluntarily departed in lieu of being deported in 1947 and that on July 1, 1948, he was in South America on a ship of foreign registry.

In the opinion of the appellee the following question is presented:

Whether appellant was "residing in the United States" upon the effective date of the 1948 amendment to the Immigration Act of 1917.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,771

ANDREAS BOULAMANDIS, Appellant,

v.

HERBERT BROWNELL, JR.,
Attorney General of the
United States, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE FACTS

Appellant is an admittedly deportable alien who sought to have his deportation suspended pursuant to Section 19 (c) of the Immigration Act, as amended in 1948. He was denied relief on the grounds that he did not meet the residence requirements of the Act.

The record[1/] indicates that appellant is a native and citizen of Greece who first came to the United States as a crewman in 1930. He has never been admitted to this country for permanent residence. His family, consisting of a wife and two grown children, are in Greece (J.A. 9, 12, 18).

In 1944 a warrant of arrest in deportation proceedings was issued by the Immigration and Naturalization Service charging

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1/ Civil No. 1834-55; I & N Service File No. A-1027554 has been made part of the record on appeal.

appellant with being in the United States without a valid visa. Pre-examination was granted but revoked in 1946 due to the exhaustion of the Greek quota. The immigration authorities extended him the privilege of voluntary departure in lieu of deportation in 1946 (J.A. 12, 15, 23).

Appellant advised the Immigration Service that he was going back to Greece.[2] The record shows, however, that he voluntarily departed from the United States to Japan on a merchant ship flying the Honduras flag on January 18, 1947.[3] He returned to this country in July, 1947 but was detained on board as a mala fide seaman.[4] He again sailed foreign to Europe and upon his return in March, 1948, he was again detained on board ship as a mala fide seaman. On July 1, 1948 appellant was on the Honduras ship in South America. His last foreign port before returning to this country in 1949 was Las Piedras, Venezuela (J.A. 12, 15, 22, 24).

In February, 1949 appellant entered the United States as a member of the crew of a ship of foreign registry. He reamined in this country even though he was not in possession of an immigration visa. A warrant of arrest in deportation proceedings was issued against him May 24, 1949 (J.A. 2, 17).[5]

2/ Page 15 of the transcript of record before the hearing examiner.

3/ Appellant testified at the immigration hearing, infra, that he left furniture and clothing in New York where he said he continued to pay rent. Prior to July, 1948 this personal property was taken to his nephew's house in New York (J.A. 24, 25).

4/ (alien seaman without an immigration visa) On this occasion appellant was sent to the U.S. Public Health facility at Ellis Island as a medical hold. Upon his discharge from the hospital he was summarily deported pursuant to a detention order which had been served upon the agent of the vessel (J.A. 12, 15).

5/ Appellant's entry and illegal residence clearly falls under §§ 13 and 14 of the Immigration Act of May 26, 1924, and is the uncontested ground for deportation.

Appellant submitted himself to the Immigration authorities in May, 1950 for deportation processing and applied for suspension of deportation or, in the alternative, voluntary departure (J.A. 17).

Appellant's case was heard in September, 1951 and the Hearing Officer of the Immigration and Naturalization Service concluded (J.A. 16):

> "While there may be some validity to respondent's contention of a constructive residence I fail to see how the circumstances outlined establish a residence for the rwspondent as required by the statute /Section 19 (c) of the Immigration Act/, especially since he was not physically present in the United States on July 1, 1948 /effective date of the amendment/ but was, in fact, in South America, or in the vicinity of South America on board a ship of foreign registry . . . Accordingly it is my opinion that the respondent has not established his eligibility for suspension. However, I believe that the respondent should be accorded the further opportunity to depart from the United States voluntarily."

This decision was adopted by the Assistant Commissioner of the Immigration and Naturalization Service May, 1952. The Commissioner concluded further that appellant's departure from the United States in January, 1947 resulted in termination of his residence in this country; that such departure did in fact break the continuity of his residence (J.A. 12, 13).

Appellant's subsequent appeal to the Board of Immigration Appeals was dismissed December 1, 1952. The Board held (J.A. 10):

> "The foregoing facts establish that this respondent has not met the residence requirements for suspension of deportation under the provisions of Section 19 (c) (2) (b) of the Immigration Act of February 5, 1917, as amended. This is true for the reason that between January, 1947 and February, 1949, a period of two years, the respondent was a rejected or excluded alien and was not a resident of the United States within the meaning of Section 19 (c) (2) (b) of the Immigration Act of 1917, as amended. It has been held that Section 19 of the Act of 1917, as amended, is concerned only with resident aliens."

On April 25, 1955 appellant filed a complaint in the U.S. District Court for the District of Columbia for a declaration judgment, review under the Administration Procedure Act and for injunctive relief. Appellee's motion for summary judgment was granted, appellant's cross motion for summary judgment denied and the complaint dismissed (J.A. 8). It is from this final order that this appeal is taken.

STATUTES INVOLVED

Section 19 (c) of the Immigration Act of 1917, 39 Stat. 889, as amended July 1, 1948, 62 Stat. 1206, 8 U.S.C. § 155 (c), provided: 6/

> "(c) In the case of any alien . . . who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien, if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *"

SUMMARY OF ARGUMENT

The 1948 amendment to the Immigration Act is peremptory in its language. It specifically requires that to be eligible for relief an alien must have been "residing in the United States upon the effective date of the Act." The record lays bare the fact that appellant voluntarily departed from the United States prior to the amendment and that on the effective date he was in South America on a ship of foreign registry. His initial departure terminated his residency in this country and his residence aboard the foreign vessel was clearly not residence in the United States.

6/ This portion of the Act has been superseded by the McCarran-Walter Act, effective December 24, 1952. The subject matter of § 155 (c) is now covered by 8 U.S.C.A. § 1254. The 1948 amendment remains applicable, however, under the Savings Clause of the 1952 Act, Sec. 405. See Miyagi v. Brownell, 97 U.S. App. D.C. 18, 227 F.2d 33 (1955).

ARGUMENT

I

Appellant Did Not Meet the Residence Requirement for Suspension of Deportation under the Immigration Act, as Amended in 1948

The interest which a deportable alien like appellant has in remaining in this country is protected only so far as Congress chooses to protect it. Congress may direct that all aliens shall leave the country, that some shall leave and that some may stay, and it may distinguish between the two by such tests as it thinks appropriate. Wolf v. Boyd, 238 F.2d 249 (9th Cir. 1956); United States v. Shaughnessy, 180 F.2d 489 (2nd Cir. 1950); Lem Moon Sing v. United States, 158 U.S. 538 (1895).

In 1948 Congress enlarged the class of deportable aliens eligible for suspension of deportation. It was aware that there were a large number of worthy cases in which resident aliens, deportable on technical grounds, who had lived in the United States for many years but were not eligible for discretionary relief on the basis of serious economic detriment. Before the 1948 legislation it took an enactment of a private bill to adjust the immigration status of such deportable aliens. Congress reasoned that it was only just that certain desirable aliens with firm roots in this country who had not been favored by introduction of private bills should have their cases reviewed. 7/

In amending Section 19 (c) of the Immigration Act in 1948 Congress limited relief by specifically stating the classes of aliens that would be eligible for consideration for suspension of deportation. The section under which appellant applied for relief set forth these

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7/ See the Senate Committee Report No. 1204 accompanying the 1948 Amendment. U.S. Cong. Serv. p. 2234, 80th Cong. 2nd Sess.

formal eligibility requirements; (19 (c) (2) (b)):

> The Attorney General may . . . suspend deportation of such alien . . . if he finds that such alien has resided continuously in the United States for seven years or more and is resident in the United States upon the effective date of this Act.

There is no escape from construing the language of the subsection 19 (c) (2) (b) other than what it says. The statute makes it clear that to qualify for suspension appellant must have (1) resided continuously in the United States for seven continuous years and (2) resided in the United States on July 1, 1948, the effective date of the Act.

The burden was on appellant to establish the statutory requirement for eligibility for suspension. It developed at the hearing before the inquiry officer of the Immigration Servide that appellant left the United States in January, 1947 and on July 1, 1948, the effective date of the Act, was on a ship of foreign registry in South America. The hearing officer held that appellant had not met the statutory prerequisites to the exercise of the discretionary relief. 8/

Thus the record lays bare the fact that appellant was not, as required by the plain language of the statute, "residing in the United States on the effective date" of the 1948 Amendment to the Immigration Act. 9/

8/ See Anderson v. Holton, __ F.2d __, 25 L.W. 2465 (7th Cir. April 4, 1957) for authority that such a determination is "agency action committed to agency discretion" and therefore is judicially nonreviewable.

9/ The Immigration Act of 1952, § 244, 66 Stat. 214, 8 U.S.C. § 1254 provides that the statutes of an alien would only be considered if he has been "physically present in the United States for a continuous period of not less than 7 years immediately preceding the date of such application." Clearly appellant would not be eligible for suspension under this standard and it is not unreasonable for this Court to take cognizance of the present day congressional attitude in interpreting the word "residing" as used in the 1948 amendment of the Immigration Act. See United States v. Shaughnessy, __ U.S. ___ (Sup. Crt. No. 205; decided March 25, 1957)

Title 8 U.S.C. § 1101 defines the term "residence" as "the place of general abode; the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."

A. Appellant's voluntary departure terminated his residence.

Appellant contends that by "act and intent" he has demonstrated continuous residence in the United States since 1930; that he never intended to relinquish his residence (Brief pp. 8-10).

In determining whether an alien has met statutory residence requirements, the intention of the alien is to be gathered from the acts of the alien rather than from his declarations. This principle is well entrenched in the immigration and naturalization laws of this country. It was well stated in the case of In re Gannon, 34 F. Supp. 211 (DC SD NY 1938); where the court, in holding that an alien's residence was broken by his voluntary departure, said (at p. 212):

> "It is to be borne in mind that in determining whether the required residence has been shown, mere statements of intent are not sufficient and that acts are of more consequence than statements by way of conclusion of what was the condition of the mind with respect to conduct. In other words, acts speak louder than words."

In 1947 the immigration authorities tendered appellant the option of either voluntarily departing or of being deported. The record shows appellant thereafter left the United States. The inference is inescapable that appellant voluntarily left the United States in 1947 so as to avoid being deported by the sovereign. Appellant's intent to relinquish his residence at that time was made apparent by his overt act of actually leaving the United States. This decision and voluntary act on his part clearly terminated appellant's residence in this country. Cf. United States v. Habbick, 287 Fed. 593 (DC NY 1923); United States v. Kummer, 300 Fed. 106 (DC NY 1924); Petition of Gislason, 47 F. Supp. 46 (DC Mass. 1942); In re Gannon, supra; United States v. Kolpachnikoff, 34 F.2d 139 (3rd Cir. 1929).

This act of voluntary departure on the part of appellant when considered with the acts of the sovereign make the termination of appellant's residence even more evident. The record reflects that the immigration authorities had withdrawn its consent as to appellant's residing in the United States by (1) authorizing his arrest in deportation proceeding in 1944 (2) revoking pre-examination

in 1946 (3) compelling him to voluntarily depart or be deported in 1947 and (4) rejecting him as a mala fide seaman on two occasions in 1947.

Thus the record clearly indicates that the authorities did not consent to appellant's continued residence. The importance of the consent of the sovereign as a determining factor in considering the residence of an alien was recognized by this Court in Kristensen v. McGrath, 86 U.S. App. D.C. 48, 179 F.2d 796 (1949) aff'd. 340 U.S. 162. There an alien's eligibility for naturalization turned on the question of whether or not he was actually "residing in the United States" and hence liable to call under the Selective Service Act at the time he sought exemption. This Court, in holding that the alien was not so residing, said (86 U.S. App. D.C. at 53, 54):

> "It is axiomatic that residence is not a term of fixed legal definition but takes on shades of meaning according to the statutory framework in which it is found. Beale, Residence and Domicil, 4 Iowa L. Bull. 3, 4 (1918); Raymond v. Leishman, 1914, 243 Pa. 64, 89 A. 791, L.R.A. 1915A, 400, Ann. Cas. 1915C. 780. And like domicile, with which it is sometimes said to be synonymous, it is a question to be determined in each case by examination of a party's intention, acts, declarations, the nature of his stay, etc. Petition of Herschman, 7 Cir., 1947, 163 F.2d 865, 867; 1 Beale, Conflict of Laws 109 (1935); 8 Mertens, Law of Federal Income Taxation 252 (1942). But wherever used, the term has an irreducible minimum of meaning. As we shall indicate, it requires at least an abode which is in some degree permanent and is the result of choice. And where aliens are concerned, absent unusual circumstances, it also requires the consent of the sovereign. Appellant's continued presence here was in no sense permanent, was not the result of choice, and was under the express dissent of the sovereign." [Emphasis added]
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> * * * * *
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> This view accords with the way in which residence is generally treated under the immigration laws. The nature of an alien's stay in this country under those statutes takes its meaning from the terms of the original permission to enter and its continued recognition by the sovereign.

The courts of this country have long recognized that the power to terminate the residence of an alien by expelling him from the country is inherent in the national sovereignty. Ekiu v. United States, 142 U.S. 651 (1892); Head Money cases, 112 U.S. 580 (1884). It is beyond question that an alien has no absolute right to remain in the United States and that Congress has plenary power over aliens

and may deport them according to its laws at any time. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Marcello v. Ahrens, 212 F.2d 830 (5th Cir. 1954) affirmed, 349 U.S. 302. In the principal case the sovereign registered its dissent to appellant's continued residence by taking affirmative action toward deporting him and by barring his subsequent attempts to enter the United States. When this expression of the authorities dissent is coupled with the voluntary act of departure on the part of appellant, it is readily apparent that his residence was terminated in 1947 and since he did not again take up residence until 1949, it is manifestly clear that appellant did not meet the residential requirements of the 1948 amendment to the Immigration Act.

B. Appellant's residence aboard a foreign vessel was not residence in the United States.

The controlling inquiry in this case is whether, on the evidence, appellant has shown that he has met the statutory requirement of "residing in the United States" on July 1, 1948, the effective date of the amendment. As to where appellant actually was on this crucial date the record leaves no room for speculation (J.A. 24):

QUESTION: Where were you on July 1, 1948?

ANSWER (by appellant): I was on the Myrtro in South America.

Faced with this statutory bar to relief under the Immigration Act, appellant urges that although he was not physically present in the United States on July 1, 1948, he maintained a residence in New York which he has never relinquished (Br. 7, 8).

It is appellees view that appellant terminated his residence in 1947 by his voluntary departure (Arg. I, supra) and this Court need not consider appellant's claim of constructive residence.

In any event, it is axiomatic that residence aboard a vessel of foreign registry is not residence in the United States. The Supreme Court of New York in In re Willis, 169 N.Y.S. 261, 102 Misc. 447 (1918), a case under the Naturalization Act of 1906, 10/ said (169 N.Y.S. at 261,2):

> The applicant is a man of good character, and I should not hesitate to admit him if I was satisfied that the statute had been substantially complied with by a continuous residence in the United States. The statute does not require the residence to be 'continuous' in the sense that an applicant must be physically, from day to day, within the United States; but there must be such a residence as to satisfy the court that it was the intention of the petitioner to make this country his permanent home. A residence aboard a foreign vessel cannot be construed as a residence in the United States.

10/ The Act of 1906 was subsequently amended by the Act of May 9, 1918, 40 Stat. 542, by adding a provision that service by aliens upon vessels other than of American registry "shall not be considered as residence for naturalization purposes".

This amendment was "in reality simply declaratory of the law as it existed before the time of passage of the amendment" United States v. Habbick, 287 Fed. 593, 595 (1923). Cf. 8 U.S.C. § 1441 which provides for constructive residence through service on certain United States vessels.

See also: Petition of MacKinnon, 183 N.Y.S. 108, 193 App. Div. 893 (NY 1920); McDonald v. United States, 279 U.S. 12, 49 S.Ct. 218, 73 L.Ed. 582 (1929).

It can only be considered as being upon foreign territory. This proposition is not without authority. Wharton on Conflict of Laws (3d Ed.) § 356 says: 'A ship in the open sea is regarded by the law of nations as a part of the territory whose flag such ship carries.' And Kent in his Commentaries (page 26, 14th Ed.) says: 'No nation has any right of jurisdiction at sea, except it be over the persons of its own subjects, in its own public and private vessels; and so far territorial jurisdiction may be considered or preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs. [Emphasis supplied]

Of course, the reason for the difficulty in the instant case is due to appellant's vocation as a seaman. Had appellant gone back to Greece in 1947 as he told the authorities he was going to do, the status of his residence would not be in question. Query whether alien seamen should be given more consideration, after voluntary departure in lieu of deportation, than aliens who must exercise their talents on foreign territory. It would be unreasonable to say that alien seamen do not terminate their residence in this country as long as they live aboard a foreign vessel, but that ordinary aliens, who do not adhere to the call of the sea, do terminate their residence by pursuing their vocation on foreign territory.

The domicil and residence of a seaman is often difficult to determine. 1 Beale, Conflict of Laws § 17.1 p. 140 (1935). But in the instant case it was apparent that from 1947 to 1949 the principal dwelling place of appellant was in fact on the ship where he was serving.[11] In Matter of Bye, 2 Daly 525 (N.Y. 1869) the court said:

> A foreigner, continuously and exclusively employed in the vessels of a nation, may by length of time acquire a residence in that nation as effectually as though he had remained upon the land within its boundaries; for vessels are subjected to the jurisdiction of the country to which they belong, and for certain purposes are regarded as part of its territory.

Thus, it may be reasonably assumed that appellant's residence

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11/ The mere fact that in 1948 some of appellant's personal property was stored at his expense at his nephew's house in New York is clearly not sufficient to establish residency there. See Petition of Wright, 42 F. Supp. 306 (D.C. Mich. 1941).

on July 1, 1948 was actually on the Hondorus ship and appellant could only be considered as being upon foreign territory.[12] His intent as to his former residence or future residence as distinguished from his actual residence was not material.

SUMMARY

The annual immigration quota of Greece is set at a mere three hundred and eight. Appellant wants to lessen that number by one and such a desire is understandable. He, unlike his fellow Greeks on the quota waiting list, has established himself in a situation in which he has had access to our administrative and judicial remedies to adjust his status. But the statute under which he seeks relief makes it a condition precedent that to avail himself of the Attorney General's discretionary power to suspend his deportation, appellant must prove that he was residing in the United States when the statutory admendment went into effect. The record clearly indicates that he was not so residing and therefore appellant is not eligible for the relief he seeks.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
JOSEPH M. F. RYAN,
FORBES W. BLAIR,
Assistant United States Attorneys.

12/ It should not be assumed that aliens have to have a residence they can call their own at any given time. An alien deported from this country to his native land or country of last residence may not be accepted by that country. Thus the situation is created that the alien has no domicil or residence except the vessel upon which he is sailing. Then too, the residence of the many aliens detained at Ellis Island is equally in the suspended or abeyed class.